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No. 01-1515

Supreme Court U.S.
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In The
Supreme Court of the United States

CITY OF DETROIT, MICHIGAN, et al.,

Petitioners,

v.

LAC VIEUX DESERT BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF

JOHN D. PIRICH (P23204)
Counsel of Record
HONIGMAN MILLER SCHWARTZ
AND COHN LLP
The Phoenix Building
222 Washington Square, Suite 400
Lansing, Michigan 48933-1800
(517) 484-8282
Counsel for Petitioner Atwater
Entertainment Associates, L.L.C.

BRUCE R. GREENE
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street
Suite 220
Boulder, Colorado 80302
(303) 442-2021
Counsel for Petitioner
Greektown Casino, L.L.C.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

This case involves the legality of the process by which Detroit selected three casino developers to enter into contracts to build and operate casinos in Detroit. Two of the three developers Detroit selected are Intervening Defendants in this case. Those two developers submit this very concise reply to two new points the Plaintiff has raised in response to the Defendants' Petition for Writ of Certiorari.

ARGUMENT

I. THIS COURT'S DECISIONS IN *O'HARE* AND *UMBEHR* ARE NOT LIMITED TO CONTRACTS FOR PUBLIC SERVICES.

Plaintiff argues for the first time in its response to the Petition for Writ of Certiorari that this Court's decisions in the companion cases of *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) and *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996) are inapposite because they apply only when the government is contracting for "selected public services." Brief in Opposition at 13. Plaintiff argues that because the operation of casinos is not a public service, this case poses no conflict with *O'Hare* and *Umbehr*. *See Id.* at 16.

This new theory of Plaintiff's is erroneous in two respects. First, Plaintiff's overly constricted view would obviously exclude, for example, contracts for goods, which this Court expressly referenced in *O'Hare*: "Cities and other governmental entities make a wide range of decisions in the course of contracting for goods and services." *O'Hare,* 518 U.S. at 724. Contrary to Plaintiff's argument,

this Court said it is the government's general interests "as contractor" that are accorded deference, *Umbehr*, 518 U.S. at 678, and that "the government has broad discretion in formulating its contracting policies," *O'Hare*, 518 U.S. at 714. In fact, this Court explicitly observed that this rule applies to a "spectrum" of situations. *Umbehr*, 518 U.S. at 680.

Thus, although Plaintiff may argue where on the *O'Hare* and *Umbehr* spectrum the contracts in this case lie, it cannot exclude them from that continuum altogether.

This fact is further illustrated by the second flaw in Plaintiff's new attempt to distinguish these cases. In *O'Hare*, the tow truck service operator whose speech interests were to be weighed in deference to the government's contractual discretion *did not even have a contract* with the government. He had only a "relationship." 518 U.S. at 721; *see also id.* at 715 ("where government retaliates against a contractor *or a regular provider of services*") (emphasis added). Specifically, "the city of Northlake coordinate[d] towing services through its Police Department and . . . maintained a rotation list of available towing companies. When the police receive[d] a tow request, they call[ed] the company next on the list to provide the service." *Id.* at 715. In *O'Hare*, then, this Court accorded the government deference even though towing was not a public service and the government did not even have a contract with the individuals in the private sector who provided that service. Clearly, Plaintiff's assertion that *O'Hare* and *Umbehr* are limited to situations where the government contracts with someone to provide services in the government's stead is simply wrong.

II. THIS CASE IS NOT DISTINGUISHABLE FROM *O'HARE* AND *UMBEHR* AS A LICENSING CASE.

The second new point Plaintiff raises in its response is the assertion that this case is distinguishable from *O'Hare* and *Umbehr* because the City of Detroit not only failed to contract out governmental services, "but was instead establishing a licensing scheme." Brief in Opposition at 17. Although Plaintiff managed to confuse the Sixth Circuit Court of Appeals on this issue, it should not be allowed to do the same in this Court.

The Sixth Circuit Court of Appeals issued the unfortunate dictum that the "casino licenses Detroit has issued to date are illegitimate." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F. 3d 876, 879 (6th Cir. 2002). There is no license at issue here. The Court will search the record evidence in vain for any Detroit issued license. It will similarly search the pleadings in vain for any challenge to a license or licensing decision. The only rights at issue here are contractual rights, pertaining to the Casino Development Agreements entered into between the City of Detroit and the three casino developers. Detroit has never issued a casino license, and the ordinance in dispute does not make any provision for the issuance of casino licenses by the City. The City entered only contracts regarding development of casinos. The State of Michigan issued the only licenses pertaining to these casinos, and the State and the licenses it issued are no longer the subject of this case.

Therefore, Plaintiff's attempt to distinguish this case from *O'Hare* and *Umbehr* because it is supposedly a

licensing case, instead of a contract or relationship case, must be rejected.

CONCLUSION

For the foregoing reasons and those contained in the Petition for a Writ of Certiorari, the Intervening Defendants respectfully request that the Petition be granted.

Respectfully submitted,

JOHN D. PIRICH
Counsel of Record
HONIGMAN MILLER SCHWARTZ AND COHN LLP
The Phoenix Building
222 Washington Square, Suite 400
Lansing, Michigan 48933-1800
(517) 484-8282